IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 10-00017

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BEVIN TODD CHIPPEWA,

Defendant and Appellant.

APPELLANT'S BRIEF

On Appeal From the Montana Eight Judicial District, Cascade County,
The Honorable Kenneth Neil, presiding

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STATEMENT OF THE ISSUES

Bevin Todd Chippewa's (Chippewa) rights to a fair trial and impartial jury were violated by State's race-based exclusions of prospective jurors in the peremptory challenge stage of jury selection. Further, Cheppewa's rights to a fair trial and impartial jury were violated when the district made an error of law and wrongfully excused a juror for cause.

STATEMENT OF THE CASE

Chippewa was convicted of felony arson and sentenced on May 22, 1997. (D.C. Doc. 68 at 2). Because Arson is a violent offense listed under Mont. Code Anno. § 46-23-502(13)(a), Chippewa was required to register his place of residence as a violent offender pursuant to Mont. Code Ann. § 46-23-504. Chippewa ultimately went on "transient status" as provided by subsection 5 of the same statute. (D.C. Doc. 68 at 2). The sentence was revoked for violations of probation and Chippewa was re-sentenced by a Disposition Order on February 23, 2000. (D.C. Doc. 68 at 2). After Chippewa's subsequent release, Chippewa again allegedly failed to comply with the transient status requirements after September 12, 2008, and the State filed an Information against Chippewa on January 23, 2009 charging Chippewa with one count of Failure of Violent Offender to Provide Notice of Change Address, a felony in violation of Mont. Code Ann. §§ 46-23-

502(7), 46-23-502(10), 46-23-505 and 46-23-507 (2007). (D.C. Doc. 1). On June 30, 2009, Chippewa signed another Change of Address form in compliance with his obligation to register as a violent offender, five months and a week after the charge of failing to provide notice of an address change.

Chippewa had a jury trial on May 12, 2009, and was found guilty of Failure of Violent Offender to Provide Notice of Change Address. The District Court sentenced Chippewa as a persistent felony offender and imposed a term of five years in the Montana State Prison. (D.C. Doc. 68). Chippewa filed a timely notice of appeal.

STATEMENT OF THE FACTS

At the May 12, 2009 trial Chippewa was present and represented by his appointed counsel. Preceding voire dire, the district court instructed the jury about the qualifications to serve as a juror and that anyone convicted of a felony or malfeasance of office may not serve. (5/12/2009 Tr. at 12). The district court asked the prospective jurors if there was anyone present who felt that they could not serve on the jury for one of the reasons identified in the instructions. (5/12/2009 Tr. at 16). Prospective juror J.C.C. addressed the district court and stated that he had been convicted of a felony. (5/12/2009 Tr. at 16). Thereupon, the district court excused J.C.C. from service due to his reported felony

conviction. (5/12/2009 Tr. at 17). The following colloquy transpired.

DEFENSE COUNSEL: Your Honor, may I approach?

THE COURT: You may.
(Whereupon, a side-bar was held.)

DEFENSE COUNSEL: Okay, under 46-18-801(2), the statute says, "except as provided in the Montana Constitution, if a person has been deprived of a civil or constitutional right by reason of conviction for an offense and the person's sentence has expired or the person has been pardoned, the person is restored to all civil rights and full citizenship, the same as if the conviction had not occurred." I guess my position is if [J.C.C.'s] sentence has expired, if he's no longer under any supervision, he is eligible to serve on the jury.

THE COURT: All right.

DEFENSE COUNSEL: I hadn't previously realized the statute said that. But, I recently looked at it. So long as he is not under supervision and his sentence has expired, he's qualified.

THE COURT: All right. (Presumably addressing the State) Do you have anything to say about that? We've never bothered to go into that in the past. He's going to let him get out the door on us. So where is he on this list? He's one of the first nine. So we'll have to hold up the trial until we see if we can find this guy. I mean, why didn't you say anything before I excused him and he got out the door?

DEFENSE COUNSEL: Well, typically, Your Honor, there's a number of people that raise some sort of issue. And you take them up individually before you make a ruling of as to who was going to be released, so I was expecting that would happen in this case.

THE COURT: Well, I'm going to go ahead and seat the jurors that are here. And we'll call him last and hope we can find him. But, I'm not going to declare a mistrial because this guy got excused today. I mean, this is something you could have done before he was out the door.

DEFENSE COUNSEL: I disagree with that, Your Honor. I think I did it in a timely manner. I wasn't expecting somebody was going to say they were convicted of a felony. I made my objection. So, if he's not here, I would move for a mistrial.

THE COURT: Well, your motion is denied. I've had enough of this late stuff. Go sit down.

BAILIFF: He's gone Your Honor.

(5/12/2009 Tr. at 16-19).

With that, the remaining twenty-eight prospective jurors were seated and voir dire questioning was commenced. After voir dire questioning had been conducted, the district court excused the perspective jurors and began the process of exercising the peremptory challenges. (5/12/2009 Tr. at 65). After the jury was selected, defense counsel addressed the court regarding concerns on two of the State's peremptory challenges to T. C. and T. J., juror numbers 2 and 4 respectively. (5/12/2009 Tr. at 67). Both T.C. and T.J. were the only two apparently Native American veniremembers. Defense counsel issued a challenge to the State's use of peremptory exclusions to this two jurors based on *Batson*[1] issues. The following colloquy transpired:

DEFENSE COUNSEL: Obviously, Mr. Chippewa is a Native American. And it appears to me that T. C. and T. J. may be the only Natives that were

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[1]*Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

on the panel, the jury panel. At least it appears that way to me, the only non-white members of the jury panel. And I'm not accusing anyone of racism. But Mr. Chippewa has expressed to me his insistence that he has a jury of his peers. He's specifically told me that he wanted to be sure that there was Native American representation on this jury. There were – it appears to me T. J. and T. C. were Native, or non-white, at least that's the way it appears to me. And it's notable that they were both stricken in peremptory challenges. Under the *Batson* case and the United States Supreme Court, under those circumstances, I believe that the State is required to come forward with some non-discriminatory reason striking those jurors. So I would raise that motion at this time.

THE COURT: Okay. Mr. Racki, the State needs to give reasons for the striking of those two jurors.

(5/12/2009 Tr. at 68)

THE STATE: Certainly. Starting first with T. C., he was charged with a traffic offense in 2005, although I don't recognize him personally, I was prosecuting all of those offenses at that time in the county. Additionally, he has a drug possesion case, a misdemeanor case, or had one, excuse me, with Mr. Redig [prosecution co-counsel]. I believe that case was inevitably dismissed, but those are the reasons why we felt that he probably wouldn't be a good State's juror. He also seemed fairly reserved during the questions. On his jury affidavit he stated that he had two jobs and no time for jury duty. Combine with the previous criminal charge, we just felt that he wouldn't be a fair juror for the State.

With regard to T. J., she has a 2006 drugs and paraphernalia conviction. Again, I would have been prosecuting those at that time, although I'm not sure it was a city court conviction. Additionally, she has an ongoing traffic case with [prosecution co-counsel] which he is prosecuting downstairs. And for those reasons, we moved to bump those two jurors.

(5/12/2009 Tr. at 69-70).

Defense counsel maintained the *Batson* challenge. (5/12/2009 Tr. at 70).

The district court found that the State "satisfied the requirements under *Batson* independent, non-discriminatory reasons for the challenges" and denied the motion. (5/12/2009 Tr. at 70).

Furthermore, Defense Counsel renewed his motion for a mistrial based on the summary dismissal of J.C.C., who was originally number 10 on the list. (5/12/2009 Tr. at 70). Defense Counsel maintained that if J.C.C. had sustained the challenges, he would have served on the jury but for the fact that he was excused for a felony conviction. (5/12/2009 Tr. at 70). Defense Counsel further argued that after a brief investigation of court documents it was discovered that J.C.C.'s right to serve as a juror were never suspended because the felony of which J.C.C. himself spoke was dismissed as a result of a deferred imposition of sentence. (5/12/2009 Tr. at 70-71). Therefore, Defense Counsel offered that the wrongful dismissal of J.C.C. denied Chippewa the right to a fair and impartial jury. (5/12/2009 Tr. at 71).

The State responded that J.C.C. had previously been charged with theft in 1996, some bad checks in 1997 and "some sort of drug offense" in 1998, and the State agreed that the sentence was probably deferred and got dismissed. (5/12/2009 Tr. at 72). The State argued that although the juror was excused, a mistrial was not the appropriate remedy because the defense was not sure if getting

him on the jury was crucial to their case or they were biased by a juror leaving. (5/12/2009 Tr. at 72).

The district court accepted the representation that J.C.C.'s rights were restored at some subsequent time prior to appearing for jury duty at Chippewa's trial. (5/12/2009 Tr. at 72). The district court explained that as soon as it became apparent what Defense Counsel was approaching the court about, the Bailiff was sent out immediately to attempt to locate J.C.C., but was unsuccessful. (5/12/2009 Tr. at 72). However, the district court found that no prejudice had been shown or could be implied as a result of excusing J.C.C., and denied the Defense motion for a mistrial. (5/12/2009 Tr. at 72).

SUMMARY OF THE ARGUMENT

The State's peremptory challenges striking the only Native Americans from the juror panel during the jury selection process was unconstitutional, because the State exercised its peremptory challenges in a discriminatory manner. The district court erred when it found that the State satisfied the requirement of independent, non-discriminatory reasons for the challenges.

Additionally, the district court erred in failing to grant a mistrial for improperly excusing juror J.C.C. These errors prejudiced Chippewa as he was denied a fair and impartial jury of his peers and his conviction should be reversed.

STANDARD OF REVIEW

The Montana Supreme Court reviews whether a district court's findings of fact regarding peremptory challenges are clearly erroneous and applies a *de novo* review to a court's application of the law. *State v. Ford,* 2001 MT 230, ¶ 7, 306 Mont. 517, ¶ 7, 39 P.3d 108, ¶ 7. Further, this Court reviews whether a court in granting or denying a mistrial has abused its discretion. *State v. Falls Down,* 2003 MT 300, ¶ 50, 318 Mont. 219, ¶ 50, 79 P.3d 797, ¶ 50.

ARGUMENT

A. The district court erred when it found that the State satisfied the requirement of independent, non-discriminatory reasons for its peremptory challenges.

"In all criminal prosecutions the accused shall have the right to... [a]... public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Mont. Const. Art. II Sec. 24. As one of the guarantees of an impartial jury, the State, in a criminal case, cannot utilize its peremptory challenges to remove prospective jurors solely on the basis of race. *Ford*, ¶ 15 (citing *Batson v. Kentucky,* (1986), 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69.) Though peremptory challenges "have long been essential to the trial process," *Falls Down*, ¶ 43, in *Batson*, the U.S. Supreme Court held that in a criminal case, the State's utilization of its privilege to strike individual jurors

through peremptory challenges is subject to the commands of the Equal Protection Clause. *Batson*, 476 U.S. at 89. The Court in *Batson*, created a three-prong procedure that a trial court will use to determine whether such a violation has occurred. First, the defendant must make out a prima facie case of purposeful discrimination. Then, the State must provide race-neutral explanations for its peremptory strikes. The trial court must then proceed to determine if the defendant has established purposeful discrimination. *Ford*, ¶ 16.

In the instant case, the first requirement for establishing a *Batson* argument is effectively moot, since the State immediately responded as to why it exercised its peremptory challenge. (5/12/2009 Tr. at 68). Thus, as in *State v. Falls Down*, it is unnecessary to address whether Chippewa established a prima facie case of purposeful discrimination. *Falls Down*, ¶ 47.

Then the State must provide sufficient race-neutral explanations for its peremptory strikes. Chippewa raised the *Batson* challenge when what appeared to be the only two Native American jurors, T.C. and T.J. were stricken by the State with peremptory challenges. (5/12/2009 Tr. at 67). The district court ordered the State to give its reasons for the striking of those two jurors. (5/12/2009 Tr. at 68). Starting with perspective juror T.C., the State answered that they struck T.C. because "he was charged with a traffic offense in 2005, and that the prosecutor

himself was prosecuting all such offenses within the county at the time. (5/12/2009 Tr. at 68). Additionally, the State's co-counsel stated that he had prosecuted a previous misdemeanor drug offense against T.C., but it was dismissed. (5/12/2009 Tr. at 69). Furthermore, the State claimed that T.C. had remained fairly reserved during the questions, and that on his jury affidavit T.C. had stated that he had two jobs and no time for jury duty. (5/12/2009 Tr. at 69).

With regard to T.J., the State stated that she had a 2006 drugs and paraphernalia conviction that this particular prosecutor had prosecuted and that she had an ongoing traffic case with the prosecutor's co-counsel.

With respect to perspective juror T.C. in particular, a traffic offense that occurred four years before Chippewa's trial, and a misdemeanor drug offense that was dismissed, along with a reserved demeanor and a tight work schedule should not provide sufficient grounds for peremptory challenge in light of the fundamental constitutional issues outlined in *Batson,*. Though the reasoning behind the peremptory strike of T.J. was better substantiated because her drug charge was not dismissed and the traffic case was ongoing, it merely highlights the fact that since T.C. was stricken, a slightly higher standard of sufficiency should have been made to preserve T.C., the one remaining Native on the venire. To do otherwise would lessen the import of the Equal protection Clause of the United

States Constitution as it applies the rights of individuals of cognizable minority groups to serve as jurors, and the right of the accused to an impartial jury under the United States and Montana Constitution.

After the State discloses its reasoning behind the peremptory challenges to strike members minority groups from the venire, the trial court must then proceed to determine if the defendant has established purposeful discrimination. *Ford*, ¶ 16. In this case, the district court should have found that the State's use of its peremptory challenges to strike the only two Native, or non-white jurors, was purposefully discriminatory. The State's reasoning, with respect to T.C. in particular, was insufficient and the district court had enough of a record to establish that the State's use of peremptory challenges was potentially purposefully discriminatory. As mentioned, the fact that someone has a traffic ticket four years ago, a dismissed drug charge, a quiet personality and two jobs is not necessarily grounds for excusing a juror especially when he is possibly of the same minority group as the Defendant. Peremptory challenges "have long been essential to the trial process," *Falls Down*, ¶ 43. However, when they are used to strike a perspective juror from the venire on such minimal grounds as they were against T.C. there is a risk that those peremptory challenges run afoul of the Equal Protection Clause of the United States Constitution harkening back to the pre-

Batson days where the state's unbridled use of peremptory challenges ensured that few minorities served on juries.

In this instance, the district court should not have accepted the State's reasoning behind the peremptory challenges that struck the only two non-white jurors from the venire, at least as to T.C..

For these reasons, the Defendant urges this Court to find that the district court's findings of fact as to the possible discriminatory peremptory challenges were clearly erroneous, that *de novo* review of the district court's application of the law is appropriate, and that his conviction be reversed and the case remanded.

B. The district court erred when it denied Chippewa a mistrial after the district court improperly excused perspective juror J.C.C.

It is the policy of Montana that "all qualified citizens have an obligation to serve on juries upon being summoned for jury duty, unless excused." Mont. Code Ann. § 3-15-301. A person is competent to act as a juror if the person is 18 years of age or older, a resident for at least 30 days of the state and of the city, town, or county in which the person is called for jury duty, and a citizen of the United States. *Id.* "A person is not competent to act as juror who does not possess the qualifications prescribed by 3-15-301; or who has been convicted of malfeasance in office or any felony or other high crime. Mont. Code Ann. § 3-15-303.

Additionally, except as provided in the Montana constitution, "if a person has been deprived of a civil or constitutional right by reason of conviction for an offense and the person's sentence has expired or the person has been pardoned, the person is restored to all civil rights and full citizenship, the same as if the conviction had not occurred." Mont Code Ann. § 46-18-801(2).

When a defendant claims that a trial jury was improperly constituted, the Montana Supreme Court may disturb a district court's ruling as to the qualification of a perspective juror if an abuse of discretion is proven. *State v. Barnes*, 232 Mont. 405, 409, 758 P.2d 264, 267 (1988). However, in *State v. Huffman*, 89 Mont. 194, 198, 296 P. 789, 790 (1931), this Court held that "no person can acquire a vested right to have any particular member of a panel sit upon his case unless and until such member has been accepted and sworn." Furthermore, "prejudice is not presumed from error and we are commanded to give judgment without regard to technical errors which do not affect the substantial rights of the parties." *Id.*

Chippewa's substantial rights to a fair and impartial jury were impeded by the district court when it wrongfully excused perspective juror J.C.C., number 10 on the list, for having a prior felony that had been dismissed. (5/12/2009 Tr. at 70-71). J.C.C. was qualified, and indeed had a duty to serve as a juror as he met the

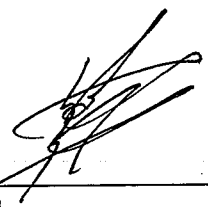
requirements in Mont. Code Ann. § 3-15-301. Furthermore, J.C.C. was not prohibited from serving as a juror under Mont. Code Ann. § 3-15-301 because his felony charge was dismissed. (5/12/2009 Tr. at 70-71). Additionally, all civil rights were restored to J.C.C. under Mont Code Ann. § 46-18-801(2), as J.C.C. was not serving a sentence for the dismissed felony charge. (5/12/2009 Tr. at 70-71). Therefore, J.C.C. was qualified to sit on the jury at Chippewa's trial and had he sustained challenges, being juror number 10, he would have been a member of the jury but for the district court wrongfully excusing him.

Chippewa moved for a mistrial because the district court erroneously disqualified J.C.C. which denied Chippewa the right to a fair and impartial jury. (5/12/2009 Tr. at 70). The district court denied the motion for a mistrial because no "prejudice had been shown or could be implied" by the error. (5/12/2009 Tr. at 70). However, as stated in *Huffman*, Chippewa could not acquire a vested right to have any particular member of a panel sit upon his case unless and until such member has been accepted and sworn. Nonetheless, this technical error by the court may have affected Chippewa's substantial rights to a fair and impartial jury because had J.C.C. withstood challenges and remained on the perspective juror list, or have been stricken by the State with a peremptory challenge, Chippewa may not have been convicted.

CONCLUSION

Chippewa was denied a fair and impartial jury due to the State's discriminatory use of peremptory challenges to strike all of the non-white people from the venire violating the Equal Protection Clause of The United States Constitution. Additonally, the district court wrongfully excused perspective juror J.C.C. which may have warranted a mistrial. Chippewa urges this Court to find that these errors, taken together affected Chippewa's substantial rights and reverse and remand his case.

Respectfully submitted this 2d day of July, 2010.



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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with a proportionately-spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words as calculated by my WordPerfect X3 software.

Dated this 6th day of July, 2010

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I, Colin M. Stephens, do hereby certify that I mailed, or caused to have delivered, this Appellant's Opening Brief, to the following:

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